Supreme Court, U. S.
FILED
APR 26 1976
MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

CASE NO. 75-1352

BEHRING CORPORATION,
a Delaware corporation,

Petitioners,

vs.

WILLIAM R. BENNETT, et al.,

Respondents,

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, IN AND FOR THE FIFTH CIRCUIT

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A.

INTRODUCTION

The Petitioner, BEHRING CORPORATION, a Delaware corporation, respectfully submits this reply to the Respondent's brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals in and for the Fifth Circuit. The Petitioner would show the court that the contentions made in Respondent's brief are wholly unsupported by the record in this cause and are clearly erroneous. The Petitioners would also represent to the court that it is clear that the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with decisions of this court and decisions of other courts of appeals.

Additionally, as already demonstrated by the petition for writ of certiorari, the court of appeals has decided an important question of federal law which has not been, but should be, settled by this court. The court of appeals has determined that it has no jurisdiction to review a district court order certifying class status, and has not even considered the collateral order doctrine of this court or the tests applied by other courts of appeals. By its failure to consider either the collateral order doctrine or the tests applied by other courts of appeals, the Fifth Circuit Court of Appeals has erroneously decided an important federal question by concluding that irrespective the prejudice, delay, vagueness or confiscatory nature of the order below, no jurisdiction to review exists.

B.

REASONS FOR GRANTING THE WRIT

Petitioner will not repeat the argument already contained in its petition for the writ of certiorari. The Petitioner shall in this reply brief demonstrate that the order of the United States Court of Appeals in and for the Fifth Circuit does clearly conflict with prior decisions of this court and decisions of other United States Courts of Appeals.

The decision of the United States Court of Appeals in and for the Fifth Circuit by its own wording reveals that the court takes the position that a district court's order granting class action certification is *absolutely* not appealable under 28 USC §1291. The Fifth Circuit held:

> It is our conclusion that the order entered by the district court *is not a final appealable order under §1291* and that the appeal should be *dismissed.* (Emphasis added).

This order, by its own terms, states that a district court's order certifying class status is absolutely not appealable under 28 USC §1291.

Respondent in his brief in opposition to the petition for writ of certiorari states:

> The unanimous opinion of the Fifth Circuit Court of Appeals based on the briefs, a voluminous record, and the contentions of the parties on oral argument was that this matter does not fall within "that small class" of cases for which interlocutory review is proper." (Respondents Brief at 3).

Respondent goes on to say:

> The Fifth Circuit clearly considered the "three prong" test and *found* that Petitioner did not satisfy it. (Emphasis added). (Respondents Brief at 4).

A careful examination of the opinion of the United States Court of Appeals for the Fifth Circuit clearly indicates that the Fifth Circuit never even considered whether this case did or did not meet the requirements of the "three prong" test. Furthermore, the Fifth Circuit never even mentioned whether this case did or did not fall in that "small class" of cases in which review is proper.

The Petitioners asserted in the Fifth Circuit and respectfully urge now that the order of the trial court does expose Petitioners to "the dangers of denying justice by delay". Petitioners asserted below and Petitioners urge here that the instant case does fall within this "small class" of cases which should be reviewed.

As clearly demonstrated by this record, the issue of class action determination is fundamental to the further conduct of this case; review of the order is separable from the merits of this case; and irreparable harm will be caused to Defendant in terms of time and money spent in defending this huge class action if review is not allowed. Clearly, in such a unique case as this, there must be at least a narrow corridor to allow review of the trial court's order finding class status.

Petitioners are not arguing that the United States Court of Appeals for the Fifth Circuit erred in finding that this case does not fall into "that small class" of cases which

should be reviewed. Petitioners are not urging that the Fifth Circuit erred in finding that this case did not meet the requisites of the "three prong" test. What Petitioners are asserting is that the Fifth Circuit failed to even consider the above as required by *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Gillespie v. United States Steel Corporation*, 379 U.S. 200, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 5411, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Herbst v. International Telephone and Telegraph Company*, 494 F.2d 1308 (2nd Cir. 1974); *Ott v. Speedwriting Publishing Co. and I.T.T.*, 518 F.2d 1143 (6th Cir. 1975); *Cessna Aircraft Distributorship Anti-Trust Litigation v. Cessna*, 518 F.2d 213 (8th Cir. 1975); *Siebert v. Great Northern Development Co.*, 494 F.2d 510 (2d Cir. 1975); *Parkinson v. April Industries*, 520 F.2d 650 (2d Cir. 1975); *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974); *General Motors v. The City of New York*, 501 F.2d 639 (2d Cir. 1974).

The holding of the Fifth Circuit that an order certifying class status is absolutely not appealable is clearly erroneous and certiorari should be granted.

CONCLUSION

The order of the United States Court of Appeals in and for the Fifth Circuit creates a situation in which Defendants in huge class actions are always subject to the unreasonable burdens of defending irrespective the incorrectness, prejudicial, vague or confiscatory nature of the trial court's order granting class certification. The decision of the Fifth Circuit denies equality of treatment between Plaintiffs and Defendants and does create the danger of denying justice by delay. However narrow, some means of review must exist in the Fifth Circuit lest the mere pendency of the class action subject the Defendant to fatal prejudice.

It is respectfully submitted that the opinion of the Fifth Circuit is in error and certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed to JON KRUPNICK, Attorney for Respondent, 1818 First National Bank Building, One Financial Plaza, Fort Lauderdale, Florida this 23 day of April, 1976.

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